United States Court of Appeals

for the Second Circuit

APPENDIX

75-7125

75-7125

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

ROBERT A. McAULIFFE
Plaintiff Appellee

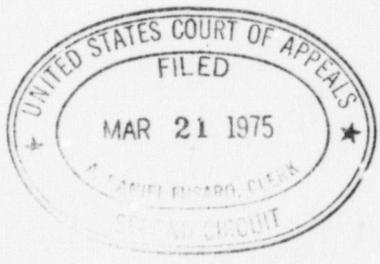
V.

ADOLF G. CARLSON
Defendant Appellant

ON APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT,
DISTRICT OF CONNECTICUT

JOINT APPENDIX

Appellant:



CARL R. AJELLO
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Assistant Attorney General
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Hartford, Connecticut

Paige J. Everin,
Assistant Attorney General
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Appellee:

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Stephen Wizner, Esquire
Dennis E. Curtis, Esquire
127 Wall Street
New Haven, Connecticut

PAGINATION AS IN ORIGINAL COPY

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RELEVANT PLEADINGS PAGE

1a.

15687

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JON O. NEWMAN

Jury demand date:

C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
ROBERT A. McAULIFFE vs. ADOLF G. CARLSON, Commissioner of Finance and Control of the State of Connecticut	For plaintiff: Michael J. Churgin Law Student Intern Stephen Wizner Dennis E. Curtis 127 Wall Street New Haven, Conn. 06520 For defendant: Maurice Myrun, Assist Atty. General 76 Meadow St. East Hartford, Conn. 06108

STATISTICAL RECORD	COSTS			DATE 1975	NAME OR RECEIPT NO.	REC.		DISB.	
S. 5 mailed	Clerk			2/14	Appeal	5	00		
				2/19	Deposit: C.S.100869			5	00
S. 6 mailed	Marshal								
asis of Action: Action ught pursuant to 42 § 1983, by an indivi- l under criminal sentence transferred to a mental tion arose at: health facil king a declaratory judgment an injunction against enforce- t of §§ 17-318 and 4-68g of the (re billing for stay and laration of incompetency).	Docket fee								
	Witness fees								
	Depositions								

15687

DATE	PROCEEDINGS	Date Orde Judgment
1973		
3/19	Complaint, Application for Three-Judge District Court, Application for Leave to Sue as a Poor Person and Order thereon granting same (Newman, J.), Affidavit of Robert A. Mc Auliffe, filed and entered this date. M-3/21/73	
"	Law Student Intern Appearance Form of Michael J. Churgin and Order thereon approving same, filed and entered. Newman, J. M-3/21/7	
3/20	Summons issued and together with copies of same and of complaint, Application, Affidavit, Intern Appearance and Orders, handed to the Marshal for service.	
"	Copies of all papers filed and entered mailed to Attorney Wizner and Attorney Churgin.	
4/2	Appearance, filed by Maurice Myrun, for the Defendant	
"	Application to Convene a Three-Judge Court, "over to 4/16/73 by agreement. No one appeared." Newman, J. M-4/2/73.	
4/4	Marshal's Return Showing Service, filed.-Summons & Complaint.	
4/12	Answer, filed by defendant.	
4/16	Memorandum in Support of Application for Three-Judge Court, filed by plaintiff.	
"	Hearing on Application to Convene a Three-Judge Court. "In view of plaintiff's decision to amend his complaint to withdraw his request for injunctive relief and seek only a declaratory judgment, and the defendant having agreed to such procedure, the motion to convene a three-judge court is denied." Newman, J. M-4/17/73. Copies mailed to all counsel.	
4/18	Amended Complaint, filed.	
5/17	Answer, filed.	
5/17	Placed on Trial List	
11/8	Motion for Summary Judgment, Notice of Motion, Affidavits of Michael J. Churgin and Robert A. McAuliffe and Memorandum in Support of Motion, filed by plaintiff.	
12/10	Memorandum in Opposition to Motion for Summary Judgment, filed.	
"	Hearing on Plaintiff's Motion for Summary Judgment. Decision Reserved. Newman, J. M-12/10/73.	
12/12	Court Reporter's Notes of proceedings held on Dec. 10, 1973, filed. Gale, R.	
1974		
5/30	Memorandum of Decision on Plaintiff's Motion for Summary Judgment, entered. Since Conn. Gen. Stat. §§ 17-318 and 4-68g violate the Fourteenth Amendment, plaintiff's motion for summary judgment is granted. Judgment will enter declaring § 17-318 unconstitutional to the extent that it imposes hospital costs upon any person transferred from a jail as defined in Conn. Gen. Stat. § 1-1, and declaring § 4-68g unconstitutional in its entirety. Newman, J. M-5/30/74 Copies mailed.	
"	Summary Judgment entered in accordance with above Memorandum of Decision. Markowski, C. M-5/31/74 Copies mailed.	
7/1	Motion for Supplemental Relief, filed by plaintiff.	
7/17	Memorandum in Support of Motion for Supplemental Relief, filed by plaintiff.	
7/26	Memorandum in Opposition to Motion for Supplemental Relief filed by Dafendant.	
1975		
1/16	Ruling on Plaintiff's Motion for Supplemental Relief, entered. Order that judgment enter against the defendant Com missioner of Finance and Control for $1,098.07 plus $150.00, with interest at 6%	

(Cont'd.)

. 110 Rev. Civil Docket Continuation Robert A. McAuliffe vs. Adolf G. Carlson, Commissioner of Finance and Control

ATE 975	PROCEEDINGS	Date Order or Judgment Noted
	from June 30, 1972, and January 19, 1973, respectively. Plaintiff's motion for attorneys' fees is denied, but he may recover his costs. Newman, J. M-1/16/75 Copies to Atty Churgin and Asst. Atty Gen.	
17	Supplemental Judgment entered in favor of plaintiff to recover of the defendant Commissioner of Finance and Control the sum of $1,098.07 plus $150.00 with interest at 6% from June 30, 1972 and January 19, 1973, respectively, with his costs of action. Markowski, C. M-1/17/75 Copies mailed.	
/13	Notice of Appeal from Supplemental Judgment entered 1/17/75, filed by Defendant. Copies mailed. Copies of Docket entries and copy of Notice of Appeal mailed to U.S.C.A.	
/21	Notice of Cross-Appeal, filed by Plaintiff. Copies to Counsel and U.S.C.A.	

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT A. McAULIFFE,

Plaintiff

Index No. 15687

vs.

ADOLF G. CARLSON,
Commissioner of Finance and Control
of the State of Connecticut,

Defendant

AMENDED COMPLAINT

Plaintiff, by counsel, complaining of defendant, respectfully alleges:

I.

A. This is an action for a declaratory judgment declaring unconstitutional Section 17-318 of the Connecticut General Statutes as amended on the ground that said statute discriminates against male persons under criminal sentence who are transferred to mental health facilities from community correctional centers by billing them for their stay at the mental health facilities while no women nor those men transferred from Connecticut Correction Institutions are billed.

B. This is an action for a declaratory judgment declaring unconstitutional Section 4-68g of the Connecticut General Statutes as amended on the ground that said statutes declare individuals confined in mental health

facilities incompetent and appoints the Commissioner of Finance and Control as their conservator without notice and hearing solely due to presence in a mental hospital and further that said statute discriminates against poor persons in that it applies only to those persons with income and assets of less than $5000.

C. This action is brought pursuant to 42 U.S.C. §1983, to secure rights, privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution and 28 U.S.C. §2201 and 2202 seeking declaration of the rights and other legal relations of the parties.

D. Jurisdiction is conferred on this court by 28 U.S.C. §1343(3) and (4).

II.

Plaintiff, a resident of the State of Connecticut and a citizen of the United States, is an involuntary patient at the Connecticut Valley Hospital, Middletown, Connecticut.

III.

Defendant Adolf G. Carlson is Commissioner of Finance and Control of the State of Connecticut, and in that capacity is responsible for the administration and enforcement of Sections 17-318 and 4-68g of the Connecticut General Statutes as amended.

IV.

A. On August 26, 1971, plaintiff was convicted of violating Section 53-75 of the Connecticut General Statutes (breaking and entering) and was

sentenced to a term of 360 days at the Community Correctional Center at Hartford by the Circuit Court, Fifteenth Circuit.

B. On September 21, 1971, plaintiff was transferred to the Security Treatment Center in Middletown, a mental health facility, by order of the Commissioners of Correction and Mental Health or their agents. Plaintiff remained incarcerated for 218 days at said Center until April 26, 1972, during which period he was serving his sentence.

C. On June 30, 1972, pursuant to Section 17-318 of the Connecticut General Statutes as amended, the Commissioner of Finance and Control by his agent billed and collected from funds of the plaintiff held by the defendant as representative payee of social security disability benefits pursuant to 42 U.S.C. §405j, the sum of $1098.07 for the 218 days of incarceration at the Security Treatment Center (218 @ $5.037).

D. By letter dated September 13, 1972, plaintiff, by counsel submitted a request for the return of said $1098.07 to defendant Carlson.

E. By letter dated September 28, 1972, defendant Carlson by his agent Charles B. Roark, Assistant Director of the Division of Central Collections denied said request.

F. On October 12, 1972, plaintiff filed an action against defendant Carlson in the Court of Common Pleas in and for Hartford County seeking judicial review of the administrative decision.

G. On December 6, 1972, defendant by his attorney filed a motion to erase on the grounds that plaintiff was not entitled to judicial review and that plaintiff had not established his standing to sue the State of Connecticut.

G. On January 8, 1973, defendant's motion was granted by the Court and the action was erased from the docket.

V.

A. On or about December 4, 1972, plaintiff, then a patient at the Norwich Hospital, Norwich, Connecticut placed $150 in his patient account at the Norwich Hospital for his future use.

B. On or about January 19, 1973, plaintiff, following hospital procedure, sought to withdraw the money from his account.

C. Plaintiff was then informed by an unknown agent of the defendant Carlson that the money in the account had been taken by the defendant to pay for the care and treatment of the defendant, and would not be returned.

D. On January 24, 1973, plaintiff's attorney spoke with Investigator McCoy of the Department of Finance and Control at Norwich Hosptial, requesting the authority for the seizure of said money. Investigator McCoy informed plaintiff's attorney that the action had been taken pursuant to 17-21 of the Connecticut General Statutes (renamed 4-68g in the current revision).

E. Plaintiff is legally competent to manage his affiars and has never been found incompetent by any court.

VI.

A. Plaintiff respectfully requests that this court declare the statutes in question (17-318 and 4-68g of the Connecticut General Statutes as amended) unconstitutional on their face and as applied, for the following reasons:

1. Section 17-318 of the Connecticut General Statutes as amended, a copy of which is annexed hereto and made a part hereof as Exhibit A on its face and as applied is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that the statute invidiously discriminates between classes of prisoners without any rational basis for such a classification. Individuals serving their sentences in

community correction centers, including those convicted of the same crime and/or serving the same sentence as plaintiff, are not billed for the period of incarceration, while those serving their sentences in mental health facilities, having been transferred from community correction centers, as plaintiff, are billed for the period of incarceration.

2. Section 17-318 of the Connecticut General Statutes as amended on its face and as applied in is violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that the statute invidiously discriminates between subclasses of prionsers transferred to mental health facilities from correction facilities without any rational basis for such a classification. To wit:

a. Women transferred from the Connecticut Correction Institution at Niantic to a mental health facility, including those convicted of the same crime and/or serving the same sentence as plaintiff, are not billed by the state while men, as plaintiff, transferred from a community correction center to a mental health facility are billed.

b. Men transferred from the Connecticut Correction Institution at Cheshire to a mental health facility, including those convicted of the same crime and/or serving the same sentence, as plaintiff, are not billed by the state, while men, as plaintiff, transferred from a community correction center to a mental health facility are billed.

c. Men transferred from the Connecticut Correctional Institution at Somers to a mental health facility, including those convicted of the same crime and/or serving the same sentence as plaintiff, are not billed by the state, while men, as plaintiff, transferred from a community correction center to a mental health facility are billed.

3. Section 4-68g of the Connecticut General Statutes as amended, a copy of which is annexed hereto and made a part hereof as Exhibit B,

on its face and as applied is in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it declares plaintiff incompetent without notice and a proper judicial hearing solely due to his presence in a mental hospital, and designates the defendant Carlson as conservator.

4. Section 4-68g of the Connecticut General Statutes as amended on its face and as applied is in violation of the Equal Protection Clause of the Four[illegible]th Amendment to the United States Constitution in that the statute discriminates between classes of mental patients without any compelling state interest or rational basis for such a classification, affecting only those persons with assets and income of less than $5000.

VII.

Plaintiff is suffering injury by the seizure of his property and will continue to suffer injury in the future by reason of the statutory appointment of the Commissioner of Finance and Control as conservator, pursuant to Section 17-318 and 4-68g of the Connecticut General Statutes as amended.

WHEREFORE, plaintiff respectfully prays that this Court

1. Enter a declaratory judgment declaring that Section 17-318 of the Connecticut General Statutes as amended, on its face and as applied by defendant Carlson, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Enter a declaratory judgment declaring that Section 4-68g of the Connecticut General Statutes as amended, on its face and as applied by defendant Carlson, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. Enter an order directing defendant Carlson to return to plaintiff all property taken from plaintiff by defendant pursuant to Section 17-318 and 4-68g of the Connecticut General Statutes as amended with interest from the date of seizure.

4. Grant plaintiff such other and further relief as shall appear to the Court, just, proper, and equitable including allowances for costs, disbursements, and reasonable attorneys fees.

ROBERT A. McAULIFFE

By _____
Michael J. Churgin
Law Student Intern pursuant to
Local Rule 26

Dennis E. Curtis
Stephen Wizner
Attorneys for Plaintiff
127 Wall Street
New Haven, Connecticut 06520

A copy of the foregoing amended complaint has been served on Maurice Myrum, Esq., Attorney for Defendant, 76 Meadow Street, East Hartford, Connecticut 06108 by mail, postage prepaid this 16th day of April, 1973.

Cheryl R. Kay

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT A. McAULIFFE,
PLAINTIFF

VS.

ADOLF. G. CARLSON,
Commissioner of Finance and
Control of the State of
Connecticut,
DEFENDANT

INDEX NO. 15687

FIRST DEFENSE:

The defendant denies the jurisdictional claims of the plaintiff set forth in Paragraph 1 of the plaintiff's amended complaint.

SECOND DEFENSE:

1. Paragraphs II, III and IV are admitted.

2. Paragraph V except for VD and E are admitted.

3. Paragraph VI is denied.

4. As to Paragraph VII and Paragraph VD and E, the defendant states he has insufficient knowledge on which to form a belief and therefore he denies them and leave the plaintiff to his proof.

/s/ Maurice Myrun
MAURICE MYRUN
Attorney for the Defendant

Maurice Myrun
Assistant Attorney General
76 Meadow Street
East Hartford, Conn. 06108
Tel: 528-9564

I hereby certify that on the 15th day of May 1973, I served a copy hereof by depositing it in the mails to the following:

Stephen Wizner, Esquire, 127 Wall Street,
New Haven, Connecticut 06520

//s/ Maurice Myrun
MAURICE MYRUN, ASSISTANT ATTORNEY GENERAL

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT A. McAULIFFE	:	
	:	
V.	:	CIVIL NO. 15,687
	:	
ADOLF G. CARLSON, Commissioner of Finance and Control of the State of Connecticut	:	

MEMORANDUM OF DECISION
ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This suit raises interesting questions concerning fees and procedures which Connecticut imposes upon some persons who are mentally ill. The first is whether the State can charge some, but not all, prisoners for their maintenance at a state mental hospital while they are serving a criminal sentence. The second is whether the Commissioner of Finance and Control can automatically become the conservator of mental patients with modest assets in state institutions without a hearing to determine their incompetency.

The background facts leading up to the current controversy are not in dispute. On August 26, 1971, plaintiff was sentenced to serve a term of 360 days in the Hartford Community Correctional Center after conviction for breaking and entering. On September 21, 1971, the Commissioner of Corrections transferred him to a state mental health facility, the Security Treatment Center in Middletown.[a/] Plaintiff

served 218 days of his sentence at the Security Treatment Center and was released on April 26, 1972. Pursuant to Conn. Gen. Stat. § 17-318,[1/] the Commissioner of Finance and Control billed plaintiff for $1,098.07, the cost of his "hospital expense" at the Security Treatment Center computed at the rate of $5.037 per day for 218 days. This sum was collected from social security benefits that defendant was holding as representative payee of the plaintiff. 42 U.S.C. § 405(j).

After expiration of his sentence, plaintiff was involuntarily committed to the Norwich Hospital, a state hospital for the mentally ill. While at Norwich he deposited $150.00 in a patient's account, intending to save the sum for future use. Later he attempted to withdraw money from his hospital account. However, he was informed that the funds in his account would not be returned since the Commissioner of Finance and Control had been appointed his conservator, pursuant to Conn. Gen. Stat. § 4-68g,[2/] and had used the $150.00 to pay for plaintiff's hospital treatment. Conn. Gen. Stat. § 17-295(c). The Commissioner's appointment as plaintiff's conservator was not preceded by a probate court hearing to ascertain whether plaintiff was "incapable of managing his affairs," Conn. Gen. Stat. § 45-70, as generally required for designation of a conservator.

Plaintiff has moved for summary judgment in this action seeking a declaratory judgment, pursuant to 42 U.S.C. § 1983, that Conn. Gen. Stat. §§ 17-318 and 4-68g violate

the Fourteenth Amendment of the United States Constitution. Since the parties do not dispute the exitence or the truthfulness of the material facts alleged in the pleadings and in plaintiff's affidavits, the merits of plaintiff's constitutional claims can appropriately be considered.

I.

Constitutionality of Conn. Gen. Stat. § 17-318

Plaintiff does not challenge the State's power to charge prisoners for their expenses. Instead, he contends that § 17-318 violates the Equal Protection Clause by creating arbitrary classifications as to which prisoners must pay and which expenses they must pay. Five distinctions are identified, two concerning who must pay, and three concerning what expenses must be paid. (a) Prisoners transferred to a state mental hospital must pay hospital costs if they were transferred from a community correctional center (jail), but not if they were transferred from other penal institutions. (b) Prisoners transferred from a community correctional center to a state mental hospital must pay hospital costs if they are men, but not if they are women. (c) Prisoners covered by § 17-318 must pay for their hospital costs, but not the costs of their maintenance in jail. (d) Prisoners covered by § 17-318 must pay hospital costs if they were transferred to a state hospital for the mentally ill, but not if they were transferred to a general hospital for any other illness. (e) Prisoners covered by § 17-318 must pay for medical care at a state hospital for the

mentally ill if they are transferred to such a hospital for in-patient care, no matter how brief their stay, but not for out-patient medical care no matter how prolonged their treatment.

The parties agree that "strict" judicial scrutiny of these classifications is not appropriate since they are not based upon "suspect" criteria and do not infringe upon "fundamental" rights. Therefore, rather than showing that the classifications created by § 17-318 are premised upon some compelling state interest, the State must prove that they "rationally [further] some legitimate, articulated state purpose and therefore [do] not constitute an invidious discrimination in violation of the Equal Protection Clause. . . ." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

The first classification distinguishes between those inmates transferred to state mental hospitals from community correctional centers and those transferred from all other penal institutions. Only the former are charged for their hospital costs. Historically, felons were incarcerated in state prisons and misdemeanants were committed to county jails. Consequently, defendant argues, § 17-318 reflects a legislative decision that misdemeanants "should have the same obligation to pay for hospital care as the non-criminal citizen," since, unlike felons, their brief confinement for one year or less does not significantly interfere with their earning capacity or deplete their assets.

In essence, defendant claims that § 17-318 is based upon the common law policy that persons treated at public humane institutions will not be permitted to receive state aid at the taxpayers' expense if they are capable of reimbursing the public for their care.[3/] Although statutes providing state aid to citizens generally reflect this policy, its application to state expenditures for maintaining and treating prisoners is less frequent, but not novel. Earlier decisions often upheld the validity of statutes requiring prisoners to reimburse the State for their maintenance.[4/] More recent cases have upheld prisoners' liability for mental health treatment received while serving their sentences,[5/] or while in custody at state hospitals because they are unable to stand trial by reason of insanity.[6/]

Connecticut undoubtedly has a legitimate interest in relieving its taxpayers by requiring prisoners with earning potential or assets to reimburse the State for the expense of maintaining them in state hospitals. However, under the current procedures for placing prisoners in state institutions, this purpose is not rationally furthered by a statutory classification based upon the assumption that a prisoner's place of incarceration is an accurate indicator of his ability to pay his state hospital expense.

Any prisoner, irrespective of the length of his sentence, may be transferred from one correctional facility to another correctional institution if "it appears to the Commissioner [of Corrections] that the best interests of the

inmate or the other inmates will be served by such action." Conn. Gen. Stat. § 18-86. Pursuant to § 18-86, a misdemeanant or a felon, initially incarcerated at a Community Correctional Center under a sentence of one year or less,[7/] would be transferred to CCI, Somers, if his background or the nature of his offense required rehabilitative treatment available at Somers or commitment to a maximum security institution. Therefore, misdemeanants and felons serving identically brief sentences may be incarcerated at a Community Correctional Center or at CCI, Somers. However, the inmate at the Community Correctional Center will be charged for his state hospital expenses under § 17-318 on the assumption that he has received a shorter sentence than an inmate at CCI, Somers, and will be removed from the competitive job market for a shorter period.[8/]

Many inmates at Community Correctional Centers who are billed for their hospital costs may actually be imprisoned for longer periods than inmates at CCI, Somers. A felon receiving an indeterminate sentence in excess of one year from a Circuit Court, Conn. Gen. Stat. § 53a-35, is initially incarcerated at a Community Correctional Center. The Commissioner of Corrections then determines whether he should remain in a Community Correctional Center or whether it would be in the inmate's best interest to transfer him to CCI, Somers, for the balance of his sentence. Since many felons receiving indeterminate sentences may have already earned extensive jail credit awaiting trial and sentencing, they may

not be transferred to CCI, Somers, but may serve the remaining portio of their indeterminate sentences in a Community Correctional Center. If his jail time credit is added to the remaining portion of his sentence, a felon serving an indeterminate sentence in excess of one year at a Community Correctional Center may actually be imprisoned for a longer period than a felon or misdemeanant serving a sentence of less than one year at Somers.

Even if all inmates at CCI, Somers, were incarcerated for longer periods than prisoners at Community Correctional Centers, a statutory classification based upon place of incarceration would not rationally advance the state's interest in charging mental hospital expenses only to prisoners with income or assets. Under Conn. Gen. Stat. § 18-7, an inmate at Somers may be employed during his imprisonment. His wages are deposited in a bank account and are paid to him upon his release. Conn. Gen. Stat. § 18-85. However, if an inmate is still in custody, the warden at CCI, Somers, may pay any portion of the funds to the inmate or his relatives if their expenditure is necessary for the inmate's or his relatives' welfare. Id. Since an inmate's transfer from Somers to a state mental hospital is for his own welfare, the funds from his employment would presumably be available for paying his hospital expenses. It is arbitrary to exempt his assets, including his readily-available accrued wages, from being used for his state hospital costs and to charge inmates at Community Correctional Centers for such expenses

when they may be unable to obtain employment during confinement or immediately after release, and may be overburdened with other obligations. Moreover, there are less job opportunities in jails than in prisons.

The second classification concerns the distinction between male misdemeanants imprisoned in a Community Correctional Center and female misdemeanants serving identical sentences at CCI, Niantic. Conn. Gen. Stat. § 1-1 (Supp. 1973) states that when the term "jail" is employed in a statute, it means ". . . those portions of the Connecticut Correctional Institution, Niantic, used to detain female persons awaiting disposition of pending charges or to confine female persons convicted of, or who plead guilty to, the commission of misdemeanors and who have been sentenced to community correctional centers. . . ." Since § 17-318 provides that the estate of any person who is transferred from a "jail" to a state hospital shall be charged for hospital expenses, it is arguable that female misdemeanants incarcerated at CCI, Niantic, are incarcerated in a "jail" within the meaning of Conn. Gen. Stat. § 1-1 and are therefore liable for their state hospital expenses. However, the State does not dispute plaintiff's point that female misdemeanants at CCI, Niantic, serving the same sentence as a male misdemeanant at a Community Correctional Center are in fact not charged for their state hospital costs under § 17-318.

It is difficult to perceive how a classification based upon the sex of an inmate bears a substantial relation

to the State's interest in lightening the burden of taxpayers by charging prisoners with assets for their state hospital expenses. Perhaps this classification was derived from the outdated notion that females in our society do not possess their own income or assets but receive support from their families or spouses. In Frontiero v. Richardson, 411 U.S. 677, 689 n. 23 (1973), the Supreme Court observed:

> In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full time 12 months per year. See U.S. Women's Bureau, Dept. of Labor, Highlights on Women's Employment & Education 1 (W.B. Pub. No. 72-191, Mar. 1972). Moreover, 41.5% of all married women are employed. See U.S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971, p. 4 (Summary Special Labor Force Report, Aug. 1972). . . . [T]he median income for all women over the age of 14, including those who are not employed, is approximately $2,237. See Statistical Abstract of the United States Table No. 535 (1972), Source: U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 80. . . .

Therefore, current employment statistics for females refute whatever historical validity there may have been for according such differential treatment to female misdemeanants under § 17-318. The Supreme Court's recent upholding of a state's tax exemption for widows, Kahn v. Shevin, ___ U.S. ___ (Apr. 24, 1974), does not validate Connecticut's attempt to impose added charges upon prisoners simply because they are males.

It is conceivable that it would be more efficient for the State not to bill female misdemeanants at CCI, Niantic, for their state hospital expenses since it might be time consuming to determine which females at Niantic are "in jail"

within the meaning of Conn. Gen. Stat. §§ 1-1 and 17-318. Although the Supreme Court is divided on the issue of whether a classification based on sex is inherently suspect, 9/ recent decisions unequivocably indicate that "any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Equal Protection Clause of the Fourteenth Amendment]. . . .' Reed v. Reed, 404 U.S., at 77, 76." Frontiero v. Richardson, supra, 411 U.S., at 690. Obviously, mere administrative convenience is not sufficient to sustain § 17-318's differential treatment of male and female misdemeanants against a constitutional challenge on equal protection grounds.

Turning now to the variations among payments that are charged, the third classification makes a distinction between maintenance costs at a jail, which are not charged, and maintenance expenses at a mental hospital, which are charged. If, as is likely, maintenance costs at a mental hospital are higher than at a jail, the state's purpose of easing the burden on taxpayers might well be rationally furthered by charging for mental hospital costs but not jail costs. Even if the factual basis for such a distinction were demonstrated, the further distinctions that § 17-318 makes among chargeable costs add to its constitutional infirmity.

The fourth classification makes a distinction between hospitalization costs for mental illness, which are charged, and hospitalization costs for all other illnesses, which are not charged.[10/] It may well be that in some instances the costs of mental illness hospitalization exceed the costs of hospitalization for other illnesses, but there has been no demonstration that this is true generally, or for the class of transferred prisoners in particular. The State has not attempted to categorize the costs to be charged by reference to a minimum hospital stay or a minimum dollar amount. It has simply selected mental illness out of all the conditions that may require hospitalization and imposed on one class of prisoners a charge for such care. There is no basis for concluding that this classification of costs rationally furthers a legitimate state interest.

The fifth classification makes a distinction between mental illness expenses of hospitalized prisoners, which are charged, and out-patient mental illness expenses of prisoners, which are not charged. There may be facts to demonstrate that, on the average, hospitalization expenses for mentally ill prisoners exceed the costs of their out-patient care, although the risk of overinclusiveness of this classification appears high, especially in view of the modern trend toward reducing the in-patient treatment time for mental illness. Whether this classification standing alone would invalidate the statute need not be decided, since the combination of all the classifying criteria plainly place the statute beyond the

outer limits of even a restrictive view of the equal protection clause.

II.

Constitutionality of Conn. Gen. Stat. § 4-68g

Conn. Gen. Stat. § 4-68g creates a significant exception to the procedural requirements for the appointment of a conservator for a person receiving state care or assistance.[11/] Prior to the appointment of a conservator, patients at state institutions for the mentally ill who have personal property or an annual income of less than $5,000.00 are not afforded the procedural safeguards of notice and an adversary competency hearing by a probate court. Instead, their mere commitment or admission to a state institution for the mentally ill authorizes the Commissioner of Finance and Control to serve as their conservator and to hold or use their personal property or income for their support and benefit "in the same manner as a duly appointed conservator." Conn. Gen. Stat. § 4-68g. Plaintiff contends that § 4-68g infringes his right to due process of law, guaranteed by the Fourteenth Amendment, because it deprives him of his civil rights to enter and enforce contracts, settle obligations or make gifts of his property without the essential safeguards of notice and an opportunity to be heard on the issue of his competency.

Conn. Gen. Stat. § 4-68g creates the presumption that persons with personal property or assets of less than $5,000.00 are incapable of managing their affairs after

commitment, or admission to a state mental institution. This presumption of incompetency is irrefutable and irreversible since mental patients falling within the purview of § 4-68g are never afforded the opportunity to establish their ability to manage their affairs.

Prior decisions have indicated that involuntary commitment to a mental institution does not support even a presumption that a mental patient is incompetent. In Winters v. Miller, 446 F.2d 65, 68 (2d Cir. 1971), the Court of Appeals stated:

> . . . [T]he law is quite clear in New York that a finding of "mental illness" even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is "incompetent" or unable adequately to manage his own affairs. Absent a specific finding of incompetence, the mental patient retains the right to sue or defend in his own name, to sell or dispose of his property, to marry, draft a will, and, in general to manage his own affairs. (Citations omitted).

Relying upon this statement in Winters, Judge Blumenfeld indicated in Logan v. Arafeh, 346 F.Supp. 1265, 1269-70 (D. Conn. 1972), that involuntary commitment of a mental patient, pursuant to Conn. Gen. Stat. § 17-183, does not create a presumption of incompetency. By creating an irrebutable presumption of incompetency, § 4-68g denies plaintiff due process of law. Cf. Cleveland Bd. of Education v. LaFleur, ___ U.S. ___ (Jan. 21, 1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

The statute also conflicts with the Equal Protection Clause by exempting from the presumption of incompetency persons who own real property of any value or who possess personal property or income in excess of $5,000.00. These persons are entitled to an independent competency hearing in recognition of the fact that all mental patients are not incapable of managing their affairs. Obviously, it is irrational to think that all or even most state mental patients without real property and without personal property and income of more than $5,000.00 are incompetent.

The State undoubtedly has a legitimate interest in obtaining reimbursement for state mental health care rendered to individuals with assets. There may also be a greater urgency in establishing state control over the estates of state mental health patients with modest assets since their funds could be rapidly depleted.

Pursuant to Conn. Gen. Stat. § 45-72, a probate court may appoint a temporary conservator for thirty days if two physicians certify that a person is incapable of managing his affairs. Prior to the expiration of this thirty-day period, a permanent conservator may be appointed after the alleged incompetent has been afforded a full-scale competency hearing. Conn. Gen. Stat. §§ 45-70 and 45-71. It would appear that these procedures could be used to appoint the Commissioner of Finance and Control as the temporary conservator of state mental health patients with modest estates upon certification by physicians that they are incapable of

managing their affairs. Since probate court hearings at state mental institutions are not infrequent, a full-scale competency hearing could be scheduled within thirty days of the appointment of the Commissioner as temporary conservator. Under these procedures, the State would also avoid the cost of administering the estates of mental health patients who are competent. Perhaps the statutes could be amended to permit the Commissioner to initiate such proceedings.

There is also merit to plaintiff's claim that § 4-68g stigmatizes a mental patient as an incompetent without due process of law. In Wisconsin v. Constantineau, 400 U.S. 433 (1970), the Supreme Court sustained a constitutional challenge to a statute permitting the "posting" of persons as excessive drinkers without affording them notice or an opportunity to be heard. Procedural due process must be satisfied whenever the State attaches a "badge of infamy" to a citizen, although it may "not involve the stigma and hardships of a criminal conviction." Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951)(concurring opinion). In Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971), the Court of Appeals expressly characterized incompetency as a stigma.

Since the plaintiff's incompetency cannot be presumed from his involuntary commitment to Norwich Hospital, he was not officially branded with the stigma of being unable to manage his affairs until the Commissioner of Finance and Control was appointed his conservator, and this occurred without giving him any hearing on the issue of his competency.

Since Conn. Gen. Stat. §§ 17-318 and 4-68g violate the Fourteenth Amendment, plaintiff's motion for summary judgment is granted.[12/] Judgment will enter declaring § 17-318 unconstitutional to the extent that it imposes hospital costs upon any person transferred from a jail as defined in Conn. Gen. Stat. § 1-1, and declaring § 4-68g unconstitutional in its entirety.

Dated at New Haven, Connecticut, this 30 day of May, 1974.

Jon O. Newman
United States District Judge

FOOTNOTES

1/ Conn. Gen. Stat. § 17-318 provides:

> When any person has been transferred from the State Prison, the State Prison for Women, The Connecticut State Farm for Women or the Connecticut Reformatory to a state hospital, such person's hospital expense prior to the termination of his sentence shall be charged to the state. When any person has been transferred from a jail to a state hospital, such person's hospital expense prior to the termination of his sentence shall be paid out of the estate of such person, if he has any estate; if he has no estate, it shall be paid by the state. If any person, whether transferred from the State Prison, the State Prison for Women, The Connecticut State Farm for Women, the Connecticut Reformatory or a jail, is committed to a state hospital after the expiration of his sentence, such person's hospital expense shall be paid to the state in the manner provided for payment in this chapter. (Emphasis added).

As a consequences of reorganization of Connecticut correctional institutions, references to specific institutions in Conn. Gen. Stat. § 17-318 should be construed as follows:

> ["State] Prison" . . . shall be construed to mean the Connecticut Correctional Institution, Somers [hereafter CCI, Somers]; "State Prison for Women" shall be construed to mean the maximum security division of the Connecticut Correctional Institution, Niantic [hereafter CCI, Niantic]; "jails" or "jail" shall be construed to mean the Community Correctional Centers . . . and those portions of the Connecticut Correctional Institution, Niantic, used to detain female persons awaiting disposition of pending charges or to confine female persons convicted of, or who plead guilty to, the commission of misdemeanors and who have been sentenced to community correctional centers . . .; "Connecticut Reformatory" shall be construed to mean the Connecticut Correctional Institution, Cheshire [hereafter CCI, Cheshire], "The Connecticut State Farm for Women" shall be construed to mean the Connecticut Correctional Institution, Niantic. Conn. Gen. Stat. § 1-1 (Supp. 1973).

2/ Conn. Gen. Stat. § 4-68g provides:

> Whenever any person having property or an interest in property is committed or admitted to a state institution for the mentally ill or mentally retarded or, subsequent to such commitment or admission, acquires property or an interest in property, and the property is personal property of any kind or nature, not in excess of five thousand dollars, or annual income not in excess of said amount, no guardian or conservator shall be appointed, and the commissioner of finance and control shall be the guardian or conservator of such person, without court proceedings, only for the purposes hereinafter specified. He shall have authority to make any compromise or exercise any option, with the approval of the attorney general, for the purpose of collecting such funds or property. He shall have authority to release, in behalf of such person, his estate, any bank, insurance company, beneficial organization, executor, administrator, trustee, fiduciary agent, corporation, or individual, and, upon demand, any bank, insurance company, beneficial organization, executor, administrator, trustee, fiduciary agent, corporation or individual shall pay to the commissioner of finance and control, or to such person or persons as said commissioner directs, the amount due. Said commissioner shall hold or use such property or funds for the support and benefit of such person in the same manner as a duly appointed conservator, and shall maintain records of such property or funds and the disposition thereof. The receipt of said commissioner or his agent shall be sufficient authority for such bank, insurance company, beneficial organization, executor, administrator, trustee, fiduciary agent, corporation or individual for such payment, and shall discharge its or his liability therefor.

3/ The development of this common law policy and its impact upon legislation was traced in State v. Ikey's Estate, 84 Vt. 363, 366-67, 79 A. 850, 851 (1911):

> By the common law of England it is the duty of the king to take care of all his subjects who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. . . .

> Under our form of government the sovereign state has the same common law duty resting upon it concerning the care and custody of persons and estates of those who are idiots from nativity, or who have lost their intellects, and become non compos, or unable to take care of themselves . . .; and it is manifest from the statutory regulations in this respect that the policy of the State is, as at common law, that the estates of such wards shall be appropriated to their proper maintenance, before they can be supported at the expense of the state. Indeed, . . . the statute concerning the insane poor . . . goes further than this; for in cases falling within the provisions of that section it must be found not only that the insane person is destitute of means to support himself, but also that he is without relatives bound by law to support him, before an order can issue for his confinement at the expense of the State. (Citations omitted).

4/ See People v. Hawkins, 157 N.Y. 1, 51 N.E. 257, 31 N.Y.Supp. 115 (1898); Jefferson County v. Hudson, 22 Ark. 595 (1861); State v. Isaac, 13 N.C. (2 Div. L) 47 (1828); Washburn v. Belknap, 3 Conn. 502 (1821).

5/ See In Re Estate of Hockett v. State Dept. of Social Welfare, 177 Ken. 507, 280 P.2d 573 (1955); State v. Green, 272 S.W.2d 133 (Ct. Civ. App. of Tex. 1954); Auditor General v. Hall, 300 Mich. 215, 1 N.W.2d 516 (1942); Auditor General v. Olezniczak, 302 Mich. 336, 4 N.W.2d 679 (1942).

6/ See Briskman v. Central State Hospital, 264 S.W.2d 270 (Ct. App. Ky. 1954); Estate of Gestner v. Bank of America Nat'l Trust and Savings Assn., 90 Cal.2d 680, 204 P.2d 77 (Dist. Ct. App. 1949); State v. Griffith, 36 N.E.2d 489 (Ct. App. Ohio 1941); State v. Ikey's Estate, 84 Vt. 363, 79 A. 850 (1911).

7/ The sentencing provisions of Conn. Gen. Stat. § 53a-35(d) provide:

> (d) . . . [W]hen a person is sentenced for a class C or D felony or for an unclassified felony, the maximum sentence for which does not exceed ten years, the court may impose a definite sentence of imprisonment and fix a term of one year or less. (Emphasis added).

Under Conn. Gen. Stat. § 18-73, any male person between the ages of sixteen and eighteen years of age who is amenable to reformatory methods may be committed by the Superior Court to CCI, Cheshire, if he is convicted of an offense which is punishable by imprisonment in the CCI, Somers, or in a Community Correctional Center, for a shorter period than life. A minimum reformatory sentence of nine months may be imposed under this section, and a reformatory sentence of any length may be suspended after six months.

Pursuant to Conn. Gen. Stat. § 18-75, the Circuit Court may sentence any male person between the ages of sixteen and twenty-one years of age to CCI, Cheshire, if the maximum penalty for his offense does not exceed imprisonment in state prison for five years. There is no statutory minimum sentence for persons sentenced under this provision, and it is not uncommon for prisoners to be paroled after serving nine months of their sentence.

Correlating these sentencing provisions with § 17-318, a twenty-year-old misdemeanant who is incarcerated at CCI, Cheshire, for nine months pursuant to § 18-75 will not be charged for his state hospital expenses despite his brief period of incarceration. However, another twenty-year-old

misdemeanant who serves a nine-month sentence for the same offense in a Community Correctional Center, because he is not amenable to reformatory methods, will be billed for his hospital expenses although his earning capacity is impeded for an equal period of incarceration. Obviously, whatever historical validity may have existed for presuming that individuals in the State Reformatory would be less able to bear their hospital costs than inmates in jail has been significantly diminished by more recent sentencing provisions.

9/ See Kahn v. Shevin, ___ U.S. ___ (Apr. 24, 1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

10/ Under § 18-52a, a prisoner incarcerated in a Community Correctional Center who "becomes sick with a disease or malady which requires hospitalization for surgery or other medical care may be transferred . . . to any state hospital having facilities for such care. . . ." Since § 17-318 refers to charging prisoners for state hospital expense without limiting the state's right of reimbursement expenses incurred at state mental hospitals, it is arguable that prisoners transferred to state hospitals for surgery or other medical care, are also liable for their hospital expenses. However, the defendant has conceded that the § 17-318 has been applied to obtain reimbursement only for hospital expenses incurred by prisoners transferred to state mental health facilities.

11/ Under Conn. Gen. Stat. § 45-70, the Commissioner of Finance and Control may apply to a probate court for the

appointment of a conservator for any person with property who is receiving state care or assistance. If the person receiving state aid is in a state institution, notice of a competency hearing must be left with the supervisor of the institution at least five days before the hearing date. Conn. Gen. Stat. § 45-71. The alleged incompetent may attend the probate hearing with counsel, cross-examine adverse witnesses, and present evidence to refute his competency. If there is evidence sufficient to support a finding that the person receiving state care "is incapable of managing his affairs," the probate court will appoint a conservator for his property. Conn. Gen. Stat. § 45-70.

12/ Plaintiff has requested this Court to order the defendant to return with interest from the date of seizure the property taken from him pursuant to Conn. Gen. Stat. §§ 17-318 and 4-68g. No order appears necessary at present, since it is expected that, in light of this decision declaring the challenged statutes unconstitutional, defendant will agree to return to plaintiff the property taken from him. If this does not occur, plaintiff can apply for a supplemental judgment. At that time consideration can be given to whether defendant has available a defense of sovereign immunity, Edelman v. Jordan, ___ U.S. ___ (Mar. 25, 1974), or whether such defense is inapplicable to what is essentially a claim for restitution.

a/ Two statutes, Conn. Gen. Stat. §§ 17-194a and 17-246, authorize the Commissioner of Corrections to transfer a state prisoner to a state hospital for mental illness. Plaintiff does not claim that the State failed to comply with the commitment requirements of these statutes, nor does he attack their constitutionality. The constitutionality of transfer procedures is a pending issue in Chesney v. Manson, Civil No. 15,308.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT A. McAULIFFE V. ADOLF G. CARLSON, Commissioner of Finance and Control of the State of Connecticut	CIVIL NO. 15,687

SUMMARY JUDGMENT

This cause having come on for hearing on plaintiff's motion for summary judgment and this Court having rendered its Memorandum of Decision on Plaintiff's Motion for Summary Judgment, under date of May 30, 1974, granting said motion,

It is ORDERED and ADJUDGED, as follows:

(1) That Conn. Gen. Stat. § 17-318 be and is hereby declared unconstitutional to the extent that it imposes hospital costs upon any person transferred from a jail as defined in Conn. Gen. Stat. § 1-1; and

(2) That Conn. Gen. Stat. § 4-68g be and is hereby declared unconstitutional in its entirety.

Dated at New Haven, Connecticut, this 30th day of May, 1974.

SYLVESTER A. MARKOWSKI
CLERK, UNITED STATES DISTRICT COURT

By _____
Deputy In Charge

APPROVED:

JON O. NEWMAN

JON O. NEWMAN
UNITED STATES DISTRICT JUDGE
May 30, 1974

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT A. McAULIFFE	:	
	:	
V.	:	CIVIL NO. 15,687
	:	
ADOLF G. CARLSON, COMMISSIONER OF FINANCE AND CONTROL OF THE STATE OF CONNECTICUT	:	

RULING ON PLAINTIFF'S MOTION FOR SUPPLEMENTAL RELIEF

Plaintiff's motion for supplemental relief presents in an unusual context questions concerning waiver of Eleventh Amendment protection. In the first stage of this litigation, brought pursuant to 42 U.S.C. § 1983, this Court granted plaintiff's motion for summary judgment and entered an order declaring unconstitutional Conn. Gen. Stat. §§ 17-318 and 4-68g, McAuliffe v. Carleson, 377 F.Supp. 896 (D. Conn. 1974) (McAuliffe I). Under the authority of these statutes defendant, Connecticut's Commissioner of Finance and Control, had taken two sets of funds belonging to plaintiff, and had applied the money to reimburse the State for expenses incurred in providing care for plaintiff at two State mental health facilities.

The first sum of money taken by defendant was $1,098.07 in disability benefits due plaintiff under Title II of the Social Security Act. Plaintiff had been transferred to the Security Treatment Center, Middletown, from the

Hartford Community Correctional Center, and § 17-318 made all such transferees liable for the costs of their "hospitalization." To enforce this liability against plaintiff, defendant applied, under the authority conferred on him by Conn. Gen. Stat. § 4-68c,[1/] to the Secretary of Health, Education and Welfare, who authorized defendant to receive plaintiff's social security benefits as "representative payee," 42 U.S.C. § 405(j), 20 C.F.R. § 404.1601, and to expend those funds for plaintiff's use and benefit.

Plaintiff himself never had control over or possession of these funds. They were sent directly to defendant as representative payee, and he, in effect, transferred them to himself as Commissioner of Finance and Control and billing agent for the State of Connecticut. McAuliffe I held the statute making plaintiff liable for his hospital costs unconstitutional as a denial of equal protection; this use of plaintiff's funds was therefore unlawful.

The second sum was $150 over which plaintiff did initially have control. After being transferred from the Security Treatment Center to Norwich Hospital, plaintiff had begun receiving his own social security benefits pursuant to the Secretary's decision to remove the Commissioner as representative payee. Plaintiff had deposited his disability benefits in a patient's account at the hospital, expecting to draw on the account for his personal needs. Section 4-68g authorized defendant automatically to act as plaintiff's conservator. Defendant assumed this position for the purpose

of paying the balance in plaintiff's account to himself, again as billing agent for the State, to cover plaintiff's hospital bill. Though plaintiff's obligation to pay these costs was entirely lawful, McAuliffe I held that defendant's automatic "appointment" as conservator violated due process requirements; defendant's acquisition of the $150 was therefore unlawful.

Plaintiff's complaint sought, in addition to declaratory relief, an order that the State return plaintiff's funds. McAuliffe I deferred such a ruling, and indicated that if the State failed to return the funds in response to the declaratory judgment, plaintiff could move for supplemental relief, at which time the Court would be confronted with the issue of sovereign immunity, 377 F.Supp. at 906, n. 13. The State declined to return the money, and the present motion for an order directing the return, and for attorneys' fees and costs, followed. Defendant has responded to the motion by urging that this Court is without jurisdiction. He argues that he is sued in his official capacity, that the State has not consented to be sued, and that the claim for monetary relief is therefore barred by the Eleventh Amendment.

The initial question is whether the Eleventh Amendment, if not waived, provides protection against plaintiff's claims. Edelman v. Jordan, 415 U.S. 651 (1974), suggests that it does. Like the claim there for retroactive welfare benefits, plaintiff's claims here will be paid from the State treasury and are owed because of a breach of a legal duty by a State official. Plaintiff contends Jordan, which did not

involve money taken from the claimants, should be limited to claims for state funds, pointing out that the money sought here belonged to the plaintiff before the defendant acquired it.

The argument suggests that the Eleventh Amendment does not insulate a state from claims for restitution. Such an exception would still leave a state protected from unlimited assaults on its fisc, and would therefore appear consistent with the values generally protected by the Eleventh Amendment. The Supreme Court, however, has previously held the Amendment available to bar a taxpayer's claim for a refund of his own money unlawfully collected. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). The claimant in Ford Motor Co. made the decision, however unwillingly, to part with his money, whereas plaintiff here had his money taken with no action on his part at all, but there is no intimation in the opinions in Ford Motor Co. or Jordan that original ownership of the claimed funds determines Eleventh Amendment protection. Once the money enters the state treasury, the Eleventh Amendment bars its return. McAuliffe may therefore recover only if the State has waived the Amendment's protection and consented to McAuliffe's suit.

Prior decisions on Eleventh Amendment waiver offer little guidance. If the defendant's liability arose from activity outside the normal sphere of governmental operations, waiver could be found. See Parden v. Terminal R. Co., 377 U.S. 184 (1964). However, neither maintaining mental health

facilities, cf. Dawking v. Craig, 483 F.2d 1191 (4th Cir. 1973); Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), nor seeking reimbursement from patients for the services provided in such facilities, is so far beyond usual state activities as to remove Eleventh Amendment protections.[2/] But an issue of waiver nevertheless remains because of the particular means by which the State authorized the Commissioner to seek reimbursement for hospitalization expenses.[3/] With respect to each set of funds the question presented is whether the statute authorizing the Commissioner's assumption of a fiduciary role states with sufficient clarity that the Commissioner will have the same exposure to suit as would a private citizen serving in the same role. See Edelman v. Jordan, supra, 415 U.S. at 673.

With respect to the funds taken by defendant as representative payee, the legislature provided explicitly for the Commissioner to perform his fiduciary duties with precisely the same powers and obligations as any other fiduciary. Conn. Gen. Stat. § 4-68b creates the office of Estate Administrator, whose occupant serves under the Commissioner of Finance and Control. It was as the Estate Administrator that the Commissioner became representative payee, see n. 1, supra. Section 4-68c empowers one holding the office of Estate Administrator to act, inter alia, in any fiduciary capacity "under . . . any instrumentality . . . of the United States qualified to appoint fiduciaries . . . ." The statute grants the Administrator all "the same rights and

powers" of other fiduciaries, and subjects him to "the same duties and obligations as are possessed by and imposed upon guardians, conservators, administrators and other fiduciaries . . . ." (Emphasis added.) The Department of Health, Education and Welfare is without doubt an instrumentality of the United States qualified to appoint fiduciaries, and a representative payee clearly is such a fiduciary, see 20 C.F.R. § 404.1601 et seq.

The conclusion is the same with respect to the statute authorizing the Commissioner's service as conservator. Conn. Gen. Stat. § 4-68g empowers the Commissioner, as statutory conservator, to "hold or use such property or funds for the support and benefit of such person in the same manner as a duly appointed conservator . . . ."[4/] (Emphasis added.)

Each statute describes the roles available to the Commissioner by reference to traditional fiduciary relationships with clearly defined sets of powers and duties. Each statute must thus be taken to reflect not only an intent to allow the Commissioner to serve effectively as the State's bill collector, but also a carefully expressed concern that the Commissioner do so with strict regard for the usual legal rights of persons in plaintiff's circumstances. When the legislature authorized the Commissioner to become a conservator, it took into account all the content that centuries of judicial construction have added to that title. Similarly, although the term "representative payee" does not appear in § 4-68c, the references in earlier portions of that statute

to specific fiduciary roles make plain that the Commissioner is to perform the functions of a particular office and not merely receive checks for the benefit of the State.

Neither statute states in terms that the Commissioner qua fiduciary is subject to suit, but such language is for the foregoing reasons, if not superfluous, certainly unnecessary. Each statute involved here very clearly imposes on the Commissioner the obligations normally associated with the offices he is empowered to assume. Such careful specification of obligations would be meaningless unless the legislature had contemplated that the normal means for enforcing such obligations would be available. The inference is thus inescapable that the Connecticut General Assembly has consented to suits against the Commissioner of Finance and Control to enforce fiduciary obligations assumed by him when he acts pursuant to the authority of Conn. Gen. Stat. §§ 4-68c and 4-68g.

There remains for consideration the liability of a fiduciary for the actions taken by the defendant. That liability is clear as to the $1,098.07 used to pay the obligation unconstitutionally created by § 17-318. By consenting for his ward to payments not constitutionally required, the Commissioner violated his fiduciary duties. When a fiduciary receives funds to be used for the benefit of his ward, he becomes debtor to the ward for that amount, cf., Lawrence v. Security Co., 56 Conn. 423, 431 (1888), and he relieves himself of that obligation only by making payments to or for the

benefit of the ward. Ibid. An improper payment does not affect the debtor-creditor relationship thus established, but rather becomes the personal obligation of the fiduciary. Elmendorf v. Poprocki, 155 Conn. 115, 120 (1967); Lawrence v. Security Co., supra; Brown v. Eggleston, 53 Conn. 110, 116-17 (1885).

Among the duties imposed on Connecticut fiduciaries is the protection of the ward's assets from unjust and illegal claims. Winchell v. Sanger, 73 Conn. 399 (1900); Clement's Appeal from Probate, 49 Conn. 519 (1882). A fiduciary who makes animproper payment is accountable to his ward for the sum so disbursed, Elmendorf v. Poprocki, supra; Dettenborn v. Hartford National Bank & Trust Co., 121 Conn. 388 (1936); Brown v. Eggleston, supra, and good faith is no defense to that liability. Cf., State v. Washburn, 67 Conn. 187 (1896); Stempel v. Middletown Trust Co., 7 Conn.Supp. 205 (Super. Ct. Htfd. Cty. 1939), remanded on other grounds, 127 Conn. 206 (1940). If restitution is not made voluntarily, it may be ordered by a Court. Ibid.

Defendant's breach of duty also involves a second element. The funds were taken not only in payment of an obligation unconstitutionally imposed, but also for the benefit of the fiduciary and the fiduciary's employer. See Clement's Appeal from Probate, supra; Holbrook v. Brooks, 33 Conn. 347 (1866). Under all the circumstances, the breach of trust is patent, and restitution is a particularly appropriate remedy.

The appropriateness of surcharging the Commissioner for his acts as conservator in using the $150 of social security payments is somewhat less obvious. Although the Commissioner's appointment as conservator pursuant to § 4-68g was defective, the payment he made in that capacity was in response to a legitimate obligation imposed on plaintiff to reimburse the State, to the extent he was able, for the expenses of his care. It could be argued that on these facts the Connecticut courts would treat the Commissioner as a guardian de son tort, see C.J.S. Guardian and Ward § 3 at 13, and credit him for the expenditures. See In re Gilfillen's Estate, 170 Pa. 185, 32 A. 585 (1895).

Defendant has chosen to rely solely on the Eleventh Amendment defense, however, see Fed. R. Civ. P. 12(b). He has not raised any other defense, perhaps because he has concluded that his status more closely resembles that of a creditor who would not be permitted to reach these social security funds, Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973), 42 U.S.C. § 407, than it does that of a bona fide fiduciary who could appropriately apply the funds against plaintiff's obligation to the State, see 20 C.F.R. § 404.1606. See also McDougald v. Norton, 361 F.Supp. 1325, 1326 n. 2 (D. Conn. 1973)(three-judge court). In any event, the Eleventh Amendment defense has failed, no other defense has been interposed, and restitution is therefore proper.

Plaintiff's motion for attorneys' fees stands on a different footing. The Court does have discretionary authority

to award fees in a § 1983 suit, Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 497 F.2d 1113 (2d Cir. 1974), but the facts of the present case do not make such an award appropriate. Defendant's continued refusal to refund the money, even after the declaratory judgment, raised legitimate and substantial questions of Eleventh Amendment law. The refusal certainly cannot be characterized as that kind of "unreasonable, obdurate obstinacy" that justifies imposing attorneys' fees as a penalty, compare Stolberg v. Members of the Board of Trustees for the State Colleges of the State of Connecticut, 474 F.2d 485, 490 (2d Cir. 1973). Section 1983 itself provides no explicit encouragement for the award of attorneys' fees, Bridgeport Guardians, supra, 497 F.2d at 1115; compare Bradley v. Richmond School Board, 416 U.S. 696 (1974), and plaintiff's victory has not created a fund for the benefit of a class, see id. at 706 n. 8.

Accordingly, it is hereby ORDERED that judgment enter against the defendant Commissioner of Finance and Control for $1,098.07 plus $150.00, with interest at 6% from June 30, 1972, and January 19, 1973, respectively. Plaintiff's motion for attorneys' fees is denied, but he may recover his costs.

Dated at New Haven, Connecticut, this 16 day of January, 1975.

Jon O. Newman

Jon O. Newman
United States District Judge

FOOTNOTES

1/ Although the statute does not provide explicitly for the Commissioner's assumption of the role of representative payee, plaintiff has alleged that this statute confers such authority, defendant has not disputed the contention, and no contrary authority has been found.

2/ Though the State undoubtedly performs a traditional function in seeking to collect funds owing to it, there is room for doubt whether the means used here are sufficiently within normal State activity to preserve Eleventh Amendment protection. Having a state official act as representative payee and as conservator for one alleged to owe funds may be valid techniques for collecting money, but they are somewhat unusual. Decision need not rest on this distinction, however, in view of the way the State employed these techniques.

3/ The situation would have been entirely different if, for example, a relative of plaintiff had served as representative payee and as conservator. If the State had collected from such a private fiduciary, the Eleventh Amendment would clearly have barred plaintiff's claims, even if the obligation to pay was later declared to be without legal foundation or if there was a defect in the procedure for designating the fiduciary.

4/ Neither statute involved here raises the question whether a consent to suit permits such suits to be brought only in state courts, or in both federal and state courts. Compare, e.g., Ford Motor Co. v. Dept. of Treasury, supra; Medicenters of America, Inc. v. Commonwealth of Va., 373 F.Supp. 305 (E.D. Va. 1974), to Flores v. Norton & Ramsey Lines, Inc., 352 F.Supp. 150 (W.D. Tex. 1972).

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT A. McAULIFFE	)	
	)	
v.	)	CIVIL NO. 15,687
	)	
ADOLF G. CARLSON, COMMISSIONER OF FINANCE AND CONTROL OF THE STATE OF CONNECTICUT	)	

SUPPLEMENTAL JUDGMENT

This cause having come on for consideration on Plaintiff's Motion for Supplemental Relief and the Court having rendered its Ruling on Plaintiff's Motion for Supplemental Relief, under date of January 16, 1975, granting supplemental relief and denying plaintiff's motion for attorneys' fees,

It is ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the plaintiff to recover of the defendant Commissioner of Finance and Control the sum of ONE THOUSAND NINETY-EIGHT DOLLARS AND SEVEN CENTS ($1,098.07) plus ONE HUNDRED FIFTY DOLLARS ($150.00), with interest at 6% from June 30, 1972 and January 19, 1973, respectively, with his costs of action.

Dated at New Haven, Connecticut, this 17th day of January, 1975.

Sylvester A. Markowski

Clerk

By _____

Deputy In Charge

CERTIFICATION

I hereby certify that two copies of the foregoing Joint Appendix were mailed to the following counsel of record on the 20th day of March, 1975:

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